No. 87-21

FILED
JUL 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

DUANE L. MORGAN, DANIEL W. BOTTORFF, CARL L. GROOM, RICHARD W. HOEGH, DAVID L. BLOSS, ALBERT L. GRABLE, KENNETH P. HENDERSON, and PAUL A. NEWTON,
Petitioners,

v.

ST. JOSEPH TERMINAL RAILROAD CO., UNION PACIFIC RAILROAD CO., ATCHISON, TOPEKA & SANTA FE RAILWAY CO., AND THE BROTHERHOOD OF RAILWAY & AIRLINE CLERKS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the Eighth Circuit's decision conflict with this Court's decision in *Norfolk & Western R.R.* v. *Nemitz*, 404 U.S. 37 (1971), under which the federal courts, not the ICC, are to hear challenges by railroad employees to the denial of protective benefits in violation of ICC orders and the Act?

2. Should the Supreme Court exercise its supervisory authority to clarify the wholesale conflict between the lower courts by declaring the proper means of enforcing the rights of railroad employees to protection under the Interstate Commerce Act?

3. Does the doctrine of primary jurisdiction impliedly repeal 28 U.S.C. Secs. 1336 and 1337 and 49 U.S.C. Sec. 11705 by requiring prior resort to the ICC in all cases brought by railroad employees challenging the denial of protective benefits in violation of an ICC order or of the Interstate Commerce Act?

4. Did the Eighth Circuit sanction a substantial departure from the accepted and usual course of judicial proceedings when it affirmed the District Court's conclusion that, as a matter of law, a union did not violate its duty of fair representation despite evidence that the union attempted to relinquish Petitioners' statutory rights in order to pacify a larger, more powerful group of members and that the union was openly hostile toward Petitioners?

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The above-named Petitioners request that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, which affirmed the judgment of the United States District Court for the Western District of Missouri dismissing Petitioners' claims on summary judgment.

OPINIONS BELOW

The opinions of the Court of Appeals and the District Court have not been reported. Copies are attached hereto in Appendices A and C respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit affirming the judgment of the District Court was entered on April 10, 1987. This Petition is timely filed and invokes the Court's jurisdiction pursuant to 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves interpretation of 28 U.S.C. Secs. 1336(a) and 1337(a), and 49 U.S.C. Sec. 11705(a), (b)(2), (c)(1), which confer on the district courts jurisdiction to hear claims alleging the violation of an order of the Interstate Commerce Commission or of the Interstate Commerce Act itself:

28 U.S.C. Sec. 1336(a)

> Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, in whole or in part, any order of the Interstate Commerce Commission, and to enjoin or suspend, in whole or in part, any order of the Interstate Commerce Commission for the payment of money or the collection of fines, penalties, and forfeitures.

28 U.S.C. Sec. 1337(a)

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: Provided, however, that the district courts shall have original jurisdiction of an action brought under section 11707 of

title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

49 U.S.C. Sec. 11705

(a) A person injured because a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title or a freight forwarder does not obey an order of the Commission, except an order for the payment of money, may bring a civil action to enforce that order under this subsection.

* * *

(b)(2) A common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title is liable for damages sustained by a person as a result of an act or omission of that carrier in violation of this subtitle.

* * *

(c)(1) A person may file a complaint with the Commission under section 11701(b) of this title or bring a civil action under subsection (b)(1) or (2) of this section to enforce liability against a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title. A person may begin a proceeding under section 10704 or 10705 of this title to enforce liability under subsection (b)(3) of this section by filing a complaint with the Commission under section 11701(b) of this title.

STATEMENT OF THE CASE

From the 1880's until mid-1984, the St. Joseph Terminal Railroad Company ("Terminal") operated a short line railroad across the Missouri River between St. Joseph, Missouri and Elwood, Kansas. It also provided railroad terminal services to other railroads in both communities in direct competition with the Missouri Pacific Railroad.

The Terminal's owners, the Union Pacific Railroad ("UP") and the Atchison, Topeka & Santa Fe Railroad ("Santa Fe"), neither of whom had independent terminal facilities at St. Joseph, were the Terminal's primary customers. Both routed all of their trains to and from St. Joseph through the Terminal and relied exclusively on the Terminal to connect with other railroads and shippers at St. Joseph and at Elwood.

Until the summer of 1984, each of the Petitioners was employed by the St. Joseph Terminal as a clerk. All had lengthy service. Most were age fifty or older and had lived and worked in St. Joseph throughout their careers. They were represented by The Brotherhood of Railway and Airline Clerks ("BRAC").

In 1980, Union Pacific applied to the Interstate Commerce Commission ("ICC") for permission to merge with (or acquire control of) the Missouri Pacific Railroad. *Union Pacific-Control-Missouri Pacific*, 366 I.C.C. 459 (1982). As part of its overall plan to combine the operations of the two railroads into a single system, the UP asked the ICC for permission to acquire trackage rights over the Missouri Pacific at St. Joseph and to construct a connecting track between the UP's Missouri River bridge and the Missouri Pacific's terminal facilities at St. Joseph, thereby allowing the UP to use the Missouri Pacific terminal facilities and cease using the Terminal. *Id.* at 464 (Sub-docket no. 6).

In late 1982, the ICC approved the merger of the UP and the Missouri Pacific including UP's request to connect with and use the Missouri Pacific terminal facilities at St. Joseph. *Id.* at 654. The ICC's order required UP to afford protective

benefits to all employees affected by the merger as required by the Interstate Commerce Act, 49 U.S.C. Sec. 11347. *Id.* at 654. The specific protective benefits ordered were those established in *New York Dock Ry.-Control-Brooklyn Eastern Dist.*, 360 I.C.C. 60, 85 (1979). As applicable here, the *New York Dock* conditions specify that a terminal railroad employee who is affected by a merger is to be protected from dislocation or loss of income for six years after the employee is affected. Any such terminal employee whose job is eliminated in connection with a merger is entitled to be paid despite the loss of his or her job unless he or she may, by exercising pre-existing seniority rights, transfer to another job without loss of pay. Unlike other employees of the Terminal who had pre-existing seniority entitling them to move elsewhere on the UP, Petitioners had no such rights anywhere on the UP; their seniority applied only to the Terminal.

Immediately after receiving ICC authorization, the UP proceeded with its plans to close the Terminal and divert its traffic at St. Joseph to the Missouri Pacific. To that end, in May, 1983, it secretly contracted with the Missouri Pacific to use its facilities instead of those at the St. Joseph Terminal. UP also advised the Sante Fe (as co-owner of the Terminal) of its decisions to withdraw from the Terminal and to divert traffic to the Missouri Pacific "on account of" or "as a result of" the UP-Missouri Pacific merger.

As a direct result of the UP's decision to abandon the Terminal, in early 1983, Sante Fe and UP jointly decided to close and dissolve the Terminal, sell its equipment, and dispose of all of its remaining assets. In secret internal management memoranda, both UP and Santa Fe recognized their statutory obligations to protect employees affected by the Terminal's closure and to obtain ICC approval to close the Terminal. However, because the cost of employee protective benefits to the BRAC-represented clerks was estimated by management at $4,463,000 they decided to conceal their plans from the affected employees and from the ICC.

Approximately a year later, in May 1984, the railroads

finally notified BRAC of the impending demise of the Terminal. Union Pacific representatives on behalf of the railroads, then entered into negotiations with BRAC. Petitioners' requests to observe these negotiations were flatly denied by BRAC and the railroads.

Although BRAC initially asserted that the closure of the Terminal was merger-related (just like the consolidations of more than twenty other terminals on the UP system) and that Petitioners were therefore entitled to the *New York Dock* employee protective benefits required by the ICC's merger order, during the short negotiations which followed BRAC suddenly and without explanation abandoned its position and agreed with the railroads to deprive Petitioners of the *New York Dock* benefits ordered by the ICC. In lieu thereof, BRAC agreed to require Petitioners to uproot their families and move elsewhere on the UP system. Moreover, when BRAC's powerful Marysville, Kansas lodge threatened BRAC's leaders if they agreed to it, the BRAC negotiators simply turned down a railroad offer to give Petitioners job seniority. As a result, the final BRAC agreement deprived Petitioners of any job seniority. Without the protection of job seniority, the Petitioners were at the mercy of the railroads which had already threatened to move them from one menial job to another across the western United States (even to "Jackass Flats, Nevada") until they finally got fed up and quit, thereby ending their right to protective pay. Alternatively, Petitioners were told they could each take a one-time severance payment totalling $280,000 (about $35,000 per man) in lieu of the $4.5 million which the railroads estimated they owed the BRAC-represented clerks.

When Petitioners attempted to question BRAC about the sudden and unexpected surrender of their rights and BRAC's dramatic change of position, a BRAC Vice President retorted that the union would not "have any of this bull shit" (*i.e.*, members' questions), that Petitioners did not want the *New York Dock* protective benefits, and that they had no choice but to accept the agreement. Unable to determine their

rights, Petitioners accepted the agreement under obvious duress. All took the severance option to avoid uprooting their families in the face of the railroads' threat to mistreat them until they quit.

Immediately after the BRAC negotiations, the respective boards of directors of the UP and the Santa Fe formally approved the dissoulution of the Terminal and disposal of its assets, and ordered that applications be filed with the ICC for approval of the closure. That approval was neither sought nor obtained. Nonetheless, the Terminal ceased doing business and closed on July 31, 1984, and all of its employees were terminated. The Terminal's main line to the Missouri River bridge was removed and replaced by a connection from the Missouri Pacific terminal to the bridge, the Terminal's remaining trackage was leased to other railroads (again without ICC approval), and the Terminal's locomotives, equipment, buildings and other property (except real estate) were sold.

Petitioners filed suit in the United States District Court for the Western District of Missouri on November 19, 1984, alleging *inter alia* that the railroads violated the ICC's merger order by not affording them the required employee protection and by attempting to negotiate less desirable terms of protection, and further that the railroads violated the Interstate Commerce Act by abandoning and disposing of the Terminal without prior ICC approval. In addition, Petitioners charged that BRAC violated its duty of fair representation by negotiating away their rights under the statute and the ICC's merger order so that it could pacify a larger, more powerful group of employees. Jurisdiction over the commerce claims was based on 28 U.S.C. Secs. 1336-1337 and 49 U.S.C. Sec. 11705, and over the unfair representation claim on 29 U.S.C. Sec. 185.

All parties to the action moved for summary judgment. On June 3, 1986, the District Court granted the railroads' Motion for Summary Judgment, holding that the doctrine of primary jurisdiction requires referral to the ICC of all claims alleging

violations of ICC orders or of the Interstate Commerce Act. It also dismissed Petitioners' claim against BRAC, finding that as a matter of law BRAC's hostility and misconduct in negotiating away Petitioners' statutory rights did not constitute unfair representation.

On June 26, 1986, Petitioners appealed the District Court's ruling to the United States Court of Appeals for the Eighth Circuit which, on April 10, 1987, summarily affirmed the District Court.

In the meantime, on July 23, 1986, three other employees who worked for the Terminal as carmen and were represented by another union were awarded the ICC-mandated *New York Dock* protection by a unanimous arbitration panel, which ruled that the closure of the Terminal resulted from the UP-Missouri Pacific merger and that employees affected by the closure were therefore entitled to *New York Dock* benefits pursuant to the ICC merger order.

REASONS FOR GRANTING THE WRIT

1. The Eighth Circuit's Decision Conflicts With This Court's Controlling Decision in *Norfolk & Western R.R.* v. *Nemitz.*

In *Norfolk & Western R.R.* v. *Nemitz*, 404 U.S. 37 (1971), this Court held that a railroad and a union may not enter into an agreement which significantly alters employees' rights to protection under an ICC order.

The facts of this case are virtually identical to those in *Nemitz*:

Nemitz	Morgan
ICC order approving merger of two railroads guaranteed that employees of merging railroad would not be adversely affected in their employment as a result of merger.	ICC order approving merger of two railroads required that employees affected by merger be protected from adverse effects on employment as required by the ICC's *New York Dock* conditions.
Following the merger, the railroad and the employees' union entered into an agreement which purported to waive the employee protection rights mandated by the ICC order.	Following the merger, the railroad and the employees' union entered into an agreement which purported to waive the employee protection rights mandated by the ICC order.
The post-merger agreement between the railroad and the union substantially abrogated the protection against adverse effect ordered by the ICC because it conditioned maintenance of salary on relocation to another railroad in another	The post-merger agreement between the railroad and the union substantially abrogated the protection against adverse effect ordered by the ICC because it conditioned maintenance of salary on relocation to another railroad in another

Nemitz	Morgan
city — absent such a move, the affected employees would suffer loss of pay.	city — absent such a move, the affected employees would suffer loss of pay or forced termination of employment.
The affected employees rejected the offer in order to avoid uprooting their families and moving their homes.	Petitioners rejected the offer in order to avoid uprooting their faimiles and moving their homes.
The affected employees sued their employer for violating ICC order which required that they not be adversely affected by the merger of their employer with another railroad.	Petitioners sued the Terminal and its owners for violating the ICC order which required that they not be adversely affected by the merger.

Based on these facts in *Nemitz*, this Court affirmed the lower court's holding that the agreement was void and that the employees could recover in federal court for the violation of the ICC order.

Despite the virtual identity of the critical facts in *Nemitz* and in this case, both the District Court and the Court of Appeals chose to ignore *Nemitz*. This Court should grant certiorari in order to correct the Eighth Circuit's failure to follow *Nemitz*.

2. The Decisons Of The Lower Federal Courts Are In Conflict Over The Proper Procedure For Enforcing Railroad Employees' Rights Under ICC Merger Orders.

Since this Court decided *Nemitz* in 1971, almost every lower court which has heard a *Nemitz*-like case has struggled to avoid deciding it. Many have held that the federal courts lack subject matter jurisdiction to hear such claims despite the express statutory grant of jurisdiction in 49 U.S.C. Sec. 11705 and 28 U.S.C. Secs. 1336 and 1337. *E.g.*, *Hoffman* v. *Missouri Pacific R.R.*, 806 F.2d 800 (8th Cir. 1986); *Swartz* v. *Norfolk & Western Ry.*, 589 F. Supp. 743 (E.D. Mo. 1984).

Others, notably the courts which heard the instant case, have misapplied the doctrine of primary jurisdiction, holding that while the federal courts have jurisdiction to hear the claims, the ICC should hear them first. Still others have avoided the jurisdictional questions by holding, despite *Nemitz*, that such claims must be referred to arbitration. *E.g.*, *Walsh* v. *United States*, 723 F.2d 570 (7th Cir. 1983). At least one lower court has gone so far as to adopt all theories for declining to hear *Nemitz*-like cases, requiring resort first to arbitration to determine whether a merger caused an employee's loss of employment and then to the ICC to determine whether the employee was entitled to protection. *McKeon* v. *Toledo, P. & W. R.R.*, 595 F. Supp. 766 (C.D. Ill. 1984). In short, the lower courts are hopelessly confused as to the proper mechanism for enforcing ICC-ordered employee protection, and their confusion has created a costly, time-consuming procedural maze sufficient to daunt almost any employee from pursuing his or her rights.

Only the Sixth Circuit has faithfully applied *Nemitz* by requiring the district courts to hear cases alleging denial of employee protection required by ICC order. *Modin* v. *New York Central Co.*, 650 F.2d 829 (6th Cir. 1981); *Bundy* v. *Penn Central Co.*, 455 F.2d 277 (6th Cir. 1972).

This Court should grant certiorari to resolve the conflict between the Sixth Circuit's obedience to *Nemitz* and the Seventh and Eighth Circuits' repudiation of *Nemitz*. Certiorari also should be granted in order to give the lower courts guidance as to how the statutory right to protection should be enforced, an issue over which there is substantial confusion among, as well as conflict between, the circuits.

3. The Decision Of The Eighth Circuit Is Contrary To The Decisions Of This Court Concerning The Doctrine Of Primary Jurisdiction In That It Requires Deferral To The ICC Of All Railroad Employee Claims Alleging Violations Of ICC Orders Or Of The Interstate Commerce Act.

The Court of Appeals explained its application of the doctrine of primary jurisdiction as follows:

> The district court dismissed without prejudice Counts I and II finding that the doctrine of primary jurisdiction is generally applicable in cases alleging violations of ICC orders or the Interstate Commerce Act. Because it is best left to the ICC to determine in the first instance whether such violations have occurred, we affirm the district court's dismissal of the allegations set forth in Counts I and II.

Opinion at 6 (citations omitted). If interpreted this broadly, the doctrine of primary jurisdiction would completely nullify 49 U.S.C. Sec. 11705 and 28 U.S.C. Secs. 1336 and 1337, which grant the district courts jurisdiction to hear cases challenging violations of ICC orders or of the Act itself. Such a rule would openly conflict with the decisions of this Court and of the other circuit courts of appeals, all of which hold that the doctrine of primary jurisdiction is to be invoked only in far more limited circumstances.

As stated by this Court, the doctrine of primary jurisdiction requires initial referral to the ICC only of cases which involve "issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by [the] Act" [*U.S.* v. *Western Pac. R.R.*, 352 U.S. 59, 65 (1956)], or in which "a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory." *Great Northern Ry.* v. *Merchant's Elev. Co.*, 259 U.S. 285, 291 (1922). The doctrine clearly has been held not to apply to cases where there is no challenge to the reasonableness of a Commission rule [*Nader*

v. *Allegheny Airlines*, 426 U.S. 290 (1976)], as for example where the issue is simply whether a Commission order or the Act itself has been obeyed. *Pennsylvania R.R.* v. *Int'l Coal Mining Co.*, 230 U.S. 184 (1913).

Only two major questions were raised by Petitioners' Complaint against the railroads, neither of which involved an issue of national transportation policy nor the reasonableness of an ICC order. First, did the railroads violate the ICC Order when they attempted to abrogate the employee protective provisions contained therein? Second, did the railroads violate the Act by failing to obtain prior ICC approval to abandon the Terminal?

The former question is one which the courts, in cases similar to the instant one, consistently have decided without resort to the doctrine of primary jurisdiction. Thus, in *Norfolk & Western R.R.* v. *Nemitz*, *supra*, this Court affirmed the Sixth Circuit's decision allowing employees of a railroad to sue for violation of an ICC order where they alleged, as Petitioners allege here, that their employer and union entered into an agreement which abrogated protections mandated by ICC order. *Accord*, *Modin* v. *New York Central Co.*, 650 F.2d 829, 832 (6th Cir. 1981) ("Employees have a private right of action for damages against a railroad for violations of the employee arrangements imposed by the I.C.C. in connection with the approval of railroad mergers."); *Bundy* v. *Penn Central Co.*, 455 F.2d 277 (6th Cir. 1972) (employees entitled to evidentiary hearing in district court to determine whether implementing agreement negotiated by union and railroad placed them in a worse position with respect to their employment, in violation of ICC order); *Swacker* v. *Southern Ry.*, 360 F.2d 420 (4th Cir. 1966) (same).

Likewise, the courts consistently have held that it is within their competence, without resort to the doctrine of primary jurisdiction, to decide whether a railroad's abandonment of trackage or service without prior ICC approval violates the Act. *E.g.*, *ICC* v. *Maine Central R.R.*, 505 F.2d 590 (2d Cir. 1974); *ICC* v. *Chicago, R.I. & P. R.R.*, 501 F.2d 908 (8th

Cir. 1974), *cert. denied*, 420 U.S. 972 (1975); *ICC* v. *Memphis Union Station Co.*, 360 F.2d 44 (6th Cir. 1966), *cert. denied sub nom. Louisville & N. R.R.* v. *ICC*, 385 U.S. 830 (1967). So too, it is for the courts to decide whether, as claimed by the railroads here, a railroad's action is exempt from the statutory requirement of prior ICC approval. *U.S.* v. *Idaho*, 298 U.S. 105 (1936) (question whether railroad's abandonment of branch line is exempt from the Act's requirement of prior ICC approval is a legal question for the courts to decide). *Accord, Illinois Commerce Comm'n.* v. *U.S.*, 779 F.2d 1270 (7th Cir. 1985); *New Orleans Terminal Co.* v. *Spencer*, 366 F.2d 160 (5th Cir. 1966), *cert. denied*, 386 U.S. 942 (1967).

This Court should grant certiorari to clarify for the lower courts when the doctrine of primary jurisdiction requires referral of issues to the ICC, to resolve the conflict between the decision here and those of the Sixth Circuit which have not required deferral to the ICC, and to correct the Eighth Circuit's misapplication of the doctrine to this case where none of the recognized justifications for its use exist.

4. The Eighth Circuit's Affirmance Of The Denial Of Petitioners' Fair Representation Claim Departs Substantially From The Rulings Of This Court And Is In Conflict With The Decisions Of The Other Circuits.

As the Eighth Circuit correctly observed in this case (Opinion at 4), a breach of the duty of fair representation occurs when a union's conduct is arbitrary or discriminatory, or where it is characterized by bad faith, hostility, or other improper motive. *Steele* v. *Louisville & N. R.R.*, 323 U.S. 192 (1944). Indeed, arbitrary or discriminatory conduct by a union may constitute a breach of the duty of fair representation in the absence of any showing of overt hostility or bad faith. *N.L.R.B.* v. *Local 282, Int'l Bro. of Teamsters*, 740 F.2d 141 (2d Cir. 1984); *Barton Brands, Ltd.* v. *N.L.R.B.*, 529 F.2d 793 (7th Cir. 1976).

The union's duty to fairly represent its members applies not only to the manner in which employee grievances are handled or collective bargaining agreements are administered, but also to the manner in which the union negotiates with management on behalf of the employees whose interests it purports to represent. *Steele, supra; Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953).

Although the District Court and the Eighth Circuit paid appropriate lip service to these standards, both courts promptly ignored them in finding that, as a matter of law, BRAC did not breach its duty to Petitioners in this case. In granting and affirming summary judgment for the union, the lower courts necessarily decided that reasonable minds could only conclude that the following acts constitute "fair" representation:

(A) Under *New York Dock, supra*, Terminal employees were entitled to protective benefits without being compelled to relocate. *See supra* at 6. Although prohibited from doing so by virtue of this Court's decision in *Nemitz, supra*, BRAC purported to waive these rights in executing the June 7 agree-

ment, substituting therefor the "right" of the Petitioners to uproot their families and move to undesirable jobs without job seniority in Omaha or wherever (and however often) the railroad might wish to move them. BRAC consented to this abrogation of Petitioners' statutory (49 U.S.C. Sec. 11347) rights despite BRAC's knowledge that the Terminal closure was identical to more than twenty other terminal consolidations resulting from the same UP-Missouri Pacific merger, in which displaced employees received *New York Dock* protection. In permitting the union to prospectively waive Petitioners' statutory rights — rights which they possessed individually and independent of their status as union members — the holding of the Eighth Circuit is in conflict with this Court's decisions in *Nemitz*, *supra*, and *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) (an employee's independent statutory rights "can form no part of the collective-bargaining process" and are not susceptible of prospective waiver by union); as well as the Sixth Circuit's holding in *Farmer* v. *ARA Services, Inc.*, 660 F.2d 1096 (6th Cir. 1981) (union breaches its duty of fair representation by entering into collective bargaining agreement which operates to deprive members of their statutory rights.)

(B) BRAC demonstrated outward hostility toward Petitioners' small lodge, repeatedly describing it as "a pain in the ass" and "a thorn in [the union's] side." Obviously, such ill will supports the conclusion that the union acted contrary to the interests of the members (Petitioners) it was purporting to represent.

(C) Without explanation, BRAC simply declined the railroads' offer to transfer Petitioners to other locations with seniority. Had BRAC accepted this offer, Petitioners need not have feared being moved from job to job and town to town and forced to do the most menial and least desirable work, as the railroads threatened to do in order to force them to quit and thereby forfeit any protection.

BRAC's own constitution gave Petitioners the right to follow their jobs to Marysville, Kansas — carrying their

seniority with them — upon closure of the Terminal. However, because the larger, more powerful Marysville lodge loudly objected to the influx of displaced Terminal employees who might in turn "bump" Marysville workers with less seniority, BRAC simply turned down the railroad's offer to recognize Petitioners' seniority rights at other locations. By sanctioning this opprobrious behavior, the District Court and the Eighth Circuit have collided headlong with this Court's *Steele* doctrine as developed and applied throughout the other circuits. *E.g.*, *Ferro* v. *Railway Express Agency, Inc.*, 296 F.2d 847, 851 (2d Cir. 1961) (facts identical to case at bar; *held*, "it is not proper for a bargaining agent in representing all of the employees to draw distinctions among them which are based upon their political power within the union."); *Mount* v. *Grand Int'l Bro. of Locomotive Eng.*, 226 F.2d 604, 607 (6th Cir. 1955), *cert. denied*, 350 U.S. 967 (1956) (same facts; "if the Brotherhood is engaging in hostile discrimination against a portion of the membership of the craft, without a good faith representation of the entire membership of the craft, in making contracts with the carrier, the employee so discriminated against has a cause of action . . ."); *Hargrove* v. *Bro. of Locomotive Eng.*, 116 F. Supp. 3, 7 (D.D.C. 1953) (union "sacrificed [the employees'] interests and rights, not on the basis of differences relevant to authorized and reasonable purposes of collective bargaining, but solely for the benefit of another group of employees represented by them, thereby violating the duties and obligations imposed upon the Brotherhoods by the Railway Labor Act."); *Barton Brands, Ltd.* v. *N.L.R.B.*, 529 F.2d 793, 798-99 (7th Cir. 1976) (compromises in negotiation "may not be made solely for the benefit of a stronger, more politically favored group over a minority group. To allow such arbitrary decision-making is contrary to the union's duty of fair representation . . .").

(D) The picture painted by BRAC's negotiations with the Union Pacific prefatory to the Terminal's closing is one of utter disregard for Petitioners' lives and livelihood. The clear rule throughout the circuits is that

> [I]f a union representative makes no effort to communicate with persons directly affected by its actions and takes action without investigation or adequate notice and opportunity to be heard, these acts and omissions may constitute a breach of the duty of fair representation.

N.L.R.B. v. *American Postal Workers Union*, 618 F.2d 1249, 1255 (8th Cir. 1980). *See also Retana* v. *Apartment, Motel, Hotel & Elev. Oper. Union*, 453 F.2d 1018 (9th Cir. 1972) (union members deprived of opportunity to participate in negotiation of contract or enjoyment of benefits due to language barrier held to have a cause of action against union for breach of duty).

Although asked to permit local members to observe the negotiations to see what was being bargained on their behalf, BRAC repeatedly refused without reason. Moreover, Petitioners supplied BRAC with evidence that the UP was deceiving the union by transferring work away from the Terminal so as to create the impression that the Terminal's closing was inevitable and not necessarily prompted by the merger. Since *New York Dock* does not apply unless the job displacement is "merger-related," it was important to Petitioners that their proof of the work transfer be considered by their union before it gave up their rights because of some perceived weakness in its bargaining position. Even though BRAC acknowledged its own independent doubts about UP's claims of dwindling Terminal business, it chose to conduct no investigation and ignored Petitioners' pleas to consider their evidence of the UP's deception.

BRAC compounded its failure to fairly represent Petitioners by misinforming them concerning their rights under *New York Dock*. After repeatedly assuring them that they were protected, BRAC — in the midst of negotiations with the UP — suddenly announced that Petitioners did not want *New York Dock* benefits. This abrupt abdication of Petitioners' rights was admittedly motivated by a combination of

the union's unverified impression that *New York Dock* might not apply and its fear of incurring the wrath of its larger and more powerful Marysville lodge. When one Petitioner asked for clarification of BRAC's actions in negotiating an agreement which departed substantially from BRAC's previous promises to Petitioners, a BRAC officer cut off all inquiry by shouting, "We won't have any of this bull shit."

Commensurate with the union's duty to communicate with (and listen to) its members is the prohibition against misleading, deceiving, or withholding information concerning negotiations with management or administration of contracts already negotiated. *Anderson* v. *United Paperworkers Union*, 641 F.2d 574 (8th Cir. 1981); *Harrison* v. *United Transp. Union*, 530 F.2d 558 (4th Cir. 1975), *cert. denied*, 425 U.S. 958 (1976); *Farmer* v. *ARA Services, Inc.*, 660 F.2d 1096 (6th Cir. 1981). As stated above, BRAC attempted to cover up its misdeeds by failing to advise Petitioners that they could challenge UP's denial of *New York Dock* benefits, and by further withholding the fact that BRAC continued to believe that *New York Dock* applied to Petitioners. After the fact, the union discouraged anyone from challenging its actions by advising that all pay and benefits would automatically be suspended during the pendency of litigation, even though any such "change in operations" is prohibited by the terms of *New York Dock* itself.

Incredibly, the courts below held that no reasonable trier of fact could find a breach of BRAC's duty of fair representation from these facts, despite overwhelming authority to the contrary throughout the circuits as cited above.

This Court should recognize the obvious conflict between the holding of the Eighth Circuit and the authorities decided by this Court and by the other circuits, and should employ its supervisory power to rectify this aberrant decision.

CONCLUSION

For the foregoing reasons, Petitioners respectfully urge the Court to issue a Writ of Certiorari to review the judgment and opinion of the Eighth Circuit affirming the grant of summary judgment in favor of Respondents and dismissing Petitioners' Complaint below.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1822

Duane L. Morgan; Daniel W. Bottorff; Carl L. Groom; Richard W. Hoegh; David L. Bloss; Albert L. Grable; Kenneth P. Henderson; and Paul A. Newton,
Appellants,

v.

The St. Joseph Terminal Railroad Company; the Union Pacific Railroad Co.; The Atchison, Topeka and Santa Fe Railway Co.; The Brotherhood of Railway and Airline Clerks,
Appellees.

Appeal from the United States District Court for the Western District of Missouri

Submitted: January 15, 1987
Filed: April 10, 1987

Before ROSS, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

ROSS, Circuit Judge.

Eight former St. Joseph Terminal Railroad employees (plaintiff/appellants) appeal from the district court's[1] order

[1] The Honorable Howard F. Sachs, United States District Judge for the Western District of Missouri.

granting summary judgment in favor of the St. Joseph Terminal Railroad Company (Terminal), the Union Pacific Railroad Company (Union Pacific), the Atchison, Topeka and Santa Fe Railway Company (Santa Fe) (collectively referred to as the railroad defendants) and their union representative, the Brotherhood of Railway and Airline Clerks (BRAC). Appellants filed suit against their union representative alleging the union breached its statutory duty of fair representation in its negotiation of appellants' termination benefits pursuant to the closure of Terminal. Appellants' complaint against the railroad defendants charged that by denying appellants *New York Dock* benefits upon their dismissal, the railroads violated an Interstate Commerce Commission (ICC) order approving the merger of the Union Pacific and the Missouri Pacific. Furthermore, appellants alleged that the railroad defendants' abandonment of Terminal yard operations without ICC approval constituted a violation of 49 U.S.C. § 10903(a) (1982) of the Interstate Commerce Act.

The district court granted summary judgment in favor of the union on the unfair representation claim and dismissed without prejudice appellants' claims regarding violations of the ICC approval order and the Interstate Commerce Act based on the doctrine of primary jurisdiction. We affirm the judgment of the district court.

I.

For many years the St. Joseph Terminal Railroad Company provided terminal services in St. Joseph, Missouri for railroads, including its joint owners, the Union Pacific and the Santa Fe. These services included assembling and breaking up freight trains, delivering railroad cars to their final destination or to other railroads for final delivery, and performing numerous other functions incidental to these services. Although Terminal had at one time conducted some independent business, its primary operations in recent times had been to perform yard operations for Union Pacific and Santa Fe.

In 1980, Union Pacific applied to the Interstate Commerce

Commission for approval to acquire the Missouri Pacific Railroad Company. In late 1982, the ICC approved the railroad consolidation with the express condition that all employees affected by the transaction would have the benefit of the employee protection benefits set forth in *New York Dock Railway — Control — Brooklyn Eastern Dist. Term.*, 360 I.C.C. 60 (1979) (*New York Dock*).

Following the railroad consolidation, Union Pacific and Missouri Pacific entered into an agreement whereby Missouri Pacific was to perform Union Pacific's St. Joseph Yard operations in place of the service that had previously been provided by Terminal. In consequence of such agreement, Terminal lost most of its business and was forced to dismiss many of its employees, eight of whom are plaintiffs in this suit.

In contemplation of appellants' termination, BRAC, the exclusive bargaining representative of Terminal employees, began negotiating an implementing agreement with Union Pacific. Although BRAC initially asserted that the closure of Terminal was merger related and that as such *New York Dock* benefits should apply, it later changed its position and began negotiating other protective benefits, apparently due to Union Pacific's assertion that seven or eight Terminal employees could legitimately be furloughed without any protective benefits at all under the "decline in business formula" of the BRAC and Union Pacific labor contract. BRAC also maintains the willingness to negotiate something other than *New York Dock* conditions was based on its belief that those employees who chose not to relocate in Omaha would be ineligible for protection under *New York Dock*.

On June 7, 1984, BRAC and Union Pacific reached a final agreement pursuant to which appellants would, upon cessation of Terminal operations, have the option of accepting employment with Union Pacific in Omaha or, as each of the appellants chose, receiving a lump sum separation allowance in the amount of approximately one year's pay or $35,000. Appellants argue that notwithstanding their refusal to relocate in Omaha and their acceptance of the $35,000.00 settlement payment, they remained entitled to benefits under

New York Dock. Their contention that BRAC's negotiation of the June 7 Agreement, which they argue was substantially less favorable than the *New York Dock* protective conditions,[2] provides the basis for the complaint in the instant suit.

II.

Appellants first argue that BRAC breached its duty of fair representation in its negotiation of appellants' termination benefits. The gravaman [sic] of appellants' unfair representation claim is that BRAC breached its duty by negotiating termination benefits other than those benefits set forth in *New York Dock*. Appellants also argue the breach of duty is evidenced by BRAC's refusal to allow Terminal employees to attend the negotiations, their failure to investigate whether Union Pacific deceived BRAC in negotiations as well as misinforming Terminal employees concerning their rights under *New York Dock*.

A breach of the statutory duty of fair representation occurs in either a grievance or negotiations setting when "a union's conduct is arbitrary, discriminatory, or in bad faith." *Smegal* v. *Gateway Food, Inc.*, 763 F.2d 354, 359 (8th Cir. 1985). *See also Johnson* v. *The Airline Pilots in the Service of Northwest Airlines, Inc.*, 650 F.2d 133, 136-37 (8th Cir.), *cert. denied*, 454 U.S. 1063 (1981). A union's conduct may be arbitrary "even though it acted in good faith and without any hostile motive." *Smegal, supra*, 763 F.2d at 359.

The district court considered all of the evidence and found that appellants had not presented a genuine issue of material fact on the unfair representation claim and concluded that BRAC was entitled to a judgment as a matter of law. The district court determined that in the face of Union Pacific's threats that it could legitimately dismiss employees without any protective benefits, and appellants' inability to prove

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[2] If *New York Dock* had been applicable, appellants might have been eligible to receive up to six years' pay. *New York Dock, supra*, 360 I.C.C. at 84, 86.

otherwise, BRAC's decision to negotiate other than strict *New York Dock* conditions did not amount to unfair representation. Moreover, the court found that the union's belief that *New York Dock* was inapplicable to those employees who refused to relocate was not unreasonable or arbitrary in light of the recent pattern of rulings handed down by the ICC. The ICC has ruled that employees may be compelled to relocate or risk forfeiting their rights to protective benefits. *Norfolk & Western Ry. Co. — Purchase — Illinois Terminal R. Co.*, 363 I.C.C. 882, 889-90 (1981); *CSX Corp. — Control — Chessie and Seaboard C.L.I.*, 363 I.C.C. 518, 589-90 (1980). The district court concluded, therefore, that the union's negotiation of something other than *New York Dock* benefits was not unreasonable, arbitrary or in bad faith and did not constitute a breach of its duty of fair representation.

We affirm the district court's grant of summary judgment in favor of BRAC. In doing so, we will not engage in extended analysis but instead rely on the analysis set forth in the well-reasoned opinion by the district court.

We have also considered appellants' challenges to the district court's dismissal of Counts I and II pursuant to the doctine of primary jurisdiction. Count I alleges a violation of the ICC merger approval order by denying appellants the protection of *New York Dock* benefits. Count II alleges that Terminal was abandoned in violation of the Interstate Commerce Act due to the failure of Union Pacific and Santa Fe to obtain prior ICC approval as required by 49 U.S.C. § 10903(a) of the Act.

The district court dismissed without prejudice Counts I and II finding that the doctrine of primary jurisdiction is generally applicable in cases alleging violations of ICC orders, *Anderson* v. *United Transportation Union*, 557 F.2d 165, 168 (8th Cir. 1977), or the Interstate Commerce Act, *Chicago & North Western Transportation Co.* v. *Kalo Brick and Tile Co.*, 450 U.S. 311, 323 (1981). Because it is best left to the ICC to determine in the first instance whether such violations have occurred, we affirm the district court's dismissal of the allegations set forth in Counts I and II.

III.

In conclusion, this court finds that the district court did not err in granting summary judgment in favor of BRAC on the unfair representation claim. In addition, we affirm the dismissal of Counts I and II pursuant to the doctrine of primary jurisdiction.

A true copy.

Attest:
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

Docket Number 84-6150-CV-SJ-6

Name of Judge or Magistrate: Howard F. Sachs

DUANE L. MORGAN, et al.,
v.
THE ST. JOSEPH TERMINAL
RAILROAD COMPANY, et al.

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to consideration before the Court with the judge named above presiding. The issues have been determined and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

ORDERED that defendants' motion for summary judgment is GRANTED as to Count III because plaintiffs have failed to raise a material issue of fact regarding whether BRAC acted in bad faith, arbitrarily or unreasonably. It is further
ORDERED that Counts I and II be DISMISSED without prejudice. It is further
ORDERED that defendants' motion for summary judgment is GRANTED as to Counts IV through VIII because they are

preempted by the Railway Labor Act. Alternatively, they are dismissed for lack of subject matter jurisdiction.

Entered on June 4, 1986
(Filed June 4, 1986)

Clerk: R.F. Connor
Deputy Clerk: Rita Riley
Date: June 4, 1986
Document #162

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

No. 84-6150-CV-SJ-6

DUANE L. MORGAN, et al.,

Plaintiffs,

v.

THE ST. JOSEPH TERMINAL RAILROAD COMPANY, et al.,

Defendants.

MEMORANDUM AND ORDER

(Filed June 3, 1986)

Before the court are four separate motions for summary judgment, heavily briefed during the past ten months. The relevant facts will be briefly stated prior to addressing the labyrinth of legal issues raised by these motions.

I. FACTUAL BACKGROUND

In 1980, the Union Pacific Railroad Company (Union Pacific) sought the Interstate Commerce Commission's (ICC's) approval to acquire the Missouri Pacific Railroad Company (Missouri Pacific). The ICC in fact approved the acquisition in 1982, but ordered that all employees affected by the transaction would have the benefit of a detailed set of employee protection provisions, commonly known in the industry as the *New York Dock* conditions. *New York Dock Railway — Control — Brooklyn Eastern Dist. Term.*, 360 I.C.C. 60 (1979).

Since long before the present dispute arose, Union Pacific

and the Atchison, Topeka and Santa Fe Railway Company (Santa Fe) have each been one-half owners of the St. Joseph Terminal Railroad Company (Terminal). Although Terminal apparently conducted some independent business at one time, its primary occupation in recent times has been to perform yard operations for Union Pacific and Santa Fe at St. Joseph, Missouri. Terminal also leases some "main line" (i.e. non-yard) track to another, non-party, railroad.

Subsequent to the previously mentioned acquisition, Union Pacific entered into an agreement with Missouri Pacific pursuant to which Missouri Pacific was to perform Union Pacific's St. Joseph area yard operations. Union Pacific and Santa Fe then agreed that neither of them would continue to use Terminal employees or facilities to conduct yard operations. As a result, plaintiffs lost their jobs with Terminal, and many of Terminal's assets were apparently sold or leased out.[1]

Prior to Terminal's closure, plaintiffs were members of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC). In contemplation of plaintiffs' termination, BRAC negotiated an agreement with Union Pacific pursuant to which plaintiffs would, upon cessation of Terminal operations, have the option of accepting employment with Union Pacific in Omaha or, as each of the plaintiffs chose, receiving a lump sum separation allowance.[2] Plaintiffs' contention that this agreement was substantially less favorable than the *New York Dock* protective conditions provides the basis for their eight count complaint. A brief review of these counts will precede a discussion of the pending motions.

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[1] The parties dispute the continued viability of Terminal. For present purposes, however, it need only be noted that plaintiffs lost their jobs as a result of Union Pacific and Santa Fe's decisions to take their yard business elsewhere.

[2] This amount was approximately a year's pay, or $35,000, for each of the plaintiffs. If *New York Dock* protections were generally applicable, six years' pay might be required, unless such payments need not be made to employees who are offered work but decline to relocate.

Count I alleges that Union Pacific's decision to close Terminal was a result of the Missouri Pacific acquisition. Plaintiffs therefore contend that they were employees affected by the acquisition, and thus entitled to the *New York Dock* protections as specified in the ICC approval order. In Count II, plaintiffs allege that, apart from the acquisition, Terminal was closed in violation of the Interstate Commerce Act because Union Pacific and Santa Fe failed to obtain prior ICC approval. Moreover, plaintiffs contend that, had the ICC been consulted, it would have imposed the *New York Dock* protective conditions prior to approving the proposed shutdown of Terminal. Count III alleges that BRAC breached its duty of fair representation in negotiating plaintiffs' termination benefits. Counts IV through VIII raise various state law claims.

II. DISCUSSION

A. Standard of Review

Summary judgment is appropriate only where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In reviewing the facts, all permissible inferences must be viewed in the light most favorable to the non-moving party. *Glass* v. *Allis-Chalmers Corp.*, No. 85-2227, slip op. at 3 (8th Cir. April 24, 1986).

B. Fair Representation Claim

Plaintiffs contend that there are six separate areas of conduct which involve sufficiently disputed facts to prevent summary judgment and which, if proven at trial, would establish a breach of BRAC's duty of fair representation.[3] First, plaintiffs contend that the union waived their rights to *New York*

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[3] Plaintiffs raise other allegations in their complaint, such as that the union negotiators had a financial stake in the outcome. Amended Complaint, ¶ 32. These allegations are not pursued in response to the motions for summary judgment, however, and are therefore considered abandoned.

Dock dismissal benefits. This argument is premised on plaintiffs' contention that they were entitled to those benefits while refusing to accept employment in Omaha, and supported by allegations that the union did not consult counsel before determining its course of action, that it did so with knowledge that the *New York Dock* conditions had been imposed elsewhere under similar circumstances, and that it did so with the knowledge that plaintiffs could not afford to move. Second, plaintiffs allege that BRAC refused to permit local members to observe negotiations. Third, plaintiffs contend that a union representative refused to respond to a legitimate member inquiry. Fourth, plaintiffs point to what they perceive as the union's failure to adequately investigate a charge that work was being surreptitiously diverted from Terminal in an effort to make it appear as though Terminal's eventual closure was the result of dwindling business rather than the merger. Fifth, plaintiffs allege that BRAC misinformed them in a variety of ways regarding their rights under *New York Dock*. Among these are contentions that BRAC initially asserted that *New York Dock* applied, but later adopted a contrary position, and that BRAC failed to inform plaintiffs and misled them regarding their rights to challenge a denial of such benefits. Finally, plaintiffs urge that BRAC improperly and in violation of its own constitution failed to negotiate "bid/bump" seniority rights[4] for plaintiffs because a Marysville, Kansas, Local threatened suit if it did so.

The parties disagree as to the appropriate legal standard for review of these claims. Defendants contend that they are governed by *Augspurger* v. *Brotherhood of Locomotive Engineers*, 510 F.2d 853 (8th Cir. 1975), which held that a valid claim of unfair representation must allege that the actions complained of were "*motivated* by bad faith," and that the gravamen of a fair representation claim is "hostile

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[4] Such rights would have allowed plaintiffs to exercise their Terminal seniority to displace less senior UP employees at other locations. There is no dispute that, under the negotiated agreement, plaintiffs would have retained their Terminal seniority for benefit accrual purposes.

discrimination." *Id.* at 589, *quoting Gainey* v. *BRAC*, 313 F.2d 318, 323 (3rd Cir. 1963) (emphasis supplied by *Augspurger* court). This language from *Augspurger* was reiterated in *Anderson* v. *United Transportation Union*, 557 F.2d 165, 168 (8th Cir. 1977). Plaintiffs urge a somewhat less onerous standard, contending that a fair representation violation is demonstrated by showing either that the union's course of conduct was in bad faith, evidencing hostile discrimination, or was otherwise unreasonable and arbitrary. *Hellums* v. *Quaker Oats Co.*, 760 F.2d 202, 204 (8th Cir. 1985); *Smith* v. *Hussman Refrigerator Co.*, 619 F.2d 1229, 1245 (8th Cir.), *cert. denied sub nom.*, 449 U.S. 839 (1980). Defendants do not dispute plaintiffs' characterization of the *Hellums* and *Hussman* holdings *per se*, but would distinguish them as addressing the duty of fair representation in the grievance context while *Augspurger*, *Anderson* and the present case involve negotiations.

While there is at least implicit authority for this bifurcated approach in *Hussman*, 619 F.2d at 1236, I cannot agree that it is established by a fair reading of the case law as a whole. In *Vaca* v. *Sipes*, 386 U.S. 171 (1967), for instance, the Supreme Court cited a grievance case and a negotiation case interchangeably while discussing the duty of fair representation in a grievance context. 386 U.S. at 177, 190 and 194 (citing *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953) (negotiation), and *Humphrey* v. *Moore*, 375 U.S. 335 (1964) (grievance)). Moreover, the continued validity of *Augspurger* and *Anderson* are called into serious question by the Eighth Circuit's decision in *Johnson* v. *Airline Pilots in the Service of Northwest Airlines, Inc.*, 650 F.2d 133 (8th Cir.), *cert. denied*, 454 U.S. 1063 (1981). While *Johnson*, a negotiation case, is somewhat cryptic in the enunciation of the proper standard, it clearly finds fault with the district court's holding fair representation plaintiffs to a "hostile discrimination" standard. 650 F.2d at 136-37. In the absence of a more clear articulation in *Johnson* or any subsequent Eighth Circuit negotiation case, the rule of *Augspurger* and *Anderson* should probably give way to *Hussman* and *Hellums*. I therefore con-

clude that while the duty of fair representation has not always been expressed with the utmost clarity and consistency,[5] it is apparently a unitary standard, equally applicable to claims regarding grievances and negotiations.[6] I now turn to an examination of each of plaintiffs' claims in light of this standard.

As previously noted, plaintiffs' first contention is that BRAC waived their right to protective benefits under *New York Dock*. Underlying this contention is plaintiffs' interpretation of Article III of *New York Dock*, which they read as entitling them to termination benefits, despite refusals of proffered UP employment at Omaha. Defendants do not dispute that plaintiffs actually received something other than *New York Dock* benefits, but they vigorously contest plaintiffs' asserted eligibility for termination benefits under the circumstances, even if *New York Dock* is otherwise applicable. Resolution of this dispute, however, is not essential to a determination of the fair representation claim.[7] The issue presently

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[5] In *Hellums* the court held that, even absent allegations of hostile motive and lack of good faith, a union could violate its duty of fair representation if its conduct was sufficiently unreasonable and arbitrary. 760 F.2d at 204. The court later noted, however, that a union's conduct, though negligent, could not be deemed arbitrary or perfunctory so long as it was undertaken in good faith and without hostility. 760 F.2d at 206. I need not resolve any possible ambiguity in these standards, however, in light of my subsequent ruling that the union's conduct in this case was neither in bad faith nor arbitrary, in the sense that it was based on an informed, reasoned judgment. *See Hussmann*, 619 F.2d at 1237 and n.9.

[6] This does not prevent conduct regarding the same provision from being deemed arbitrary in a grievance context yet reasonable in a negotiation context. That is, a union might well be within its fair representation discretion in electing not to pursue a specific proposal at the bargaining table, while it would be acting arbitrarily in refusing to process a grievance resulting from a clear employer violation of that provision were it already embodied in the collective bargaining agreement. Just as with negligence, a finding of arbitrariness turns upon an examination of all the relevant circumstances, and whether specified conduct occurs in a grievance or negotiation context is such a circumstance.

[7] This is not to say that a final determination of plaintiffs' rights to *New*

before the court is whether there are any disputed facts which, if proven, would warrant the inference that the union acted in bad faith, or otherwise arbitrarily or unreasonably.

With one exception, discussed below, plaintiffs make only general allegations of union bad faith or hostility, and cite no specific conduct or language which would arguably warrant such an inference. Since general or conclusory allegations will not support a claim of bad faith unfair representation, *Johnson*, 650 F.2d at 136, the key issue is whether the union acted unreasonably or arbitrarily. In this vein, plaintiffs first

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York Dock would be irrelevant to the fair representation claim. If, for example, it could readily be shown that the provisions were inapplicable, the union could surely not be held liable for failing to procure them. I do not, however, agree with plaintiffs' assertion that a showing that they were actually entitled to *New York Dock* benefits would *ipso facto* result in a fair representation claim, and their reliance on *Farmer* v. *ARA Services, Inc.*, 660 F.2d 1096 (6th Cir. 1981), is misplaced. *Farmer* upheld the district court's finding of unfair representation where the union failed to explain or erroneously explained discriminatory contract terms to members and adopted numerous provisions exactly opposite to those which had been ratified by a majority of the membership. 660 F.2d at 1103-04. It then held that where unfair representation is found, Title VII liability follows if the discrimination is based on race, color, religion, sex or national origin. *Id.* at 1104. *Farmer* therefore stands for the inverse of plaintiffs' contention. That is, it holds that statutory liability may flow from an unfair representation claim, not that unfair representation liability flows from deprivations of statutory rights.

Apart from its potential lack of probative value, I do not believe the *New York Dock* applicability issue is as clear as the parties suggest, and considerations of prudence and comity counsel against my unnecessarily making a flat ruling on this subject. The issue is squarely presented under Counts I and II, which are within the primary jurisdiction of the ICC absent a valid fair representation claim. *See* ¶ II(B) of this opinion. A potential usurpation of ICC authority and expertise will therefore be avoided if the fair representation claim may be decided while reserving a definitive ruling on the *New York Dock* question. The analysis is admittedly somewhat circular, at least in theory. While I am not prepared to hold that issues otherwise originally cognizable by the ICC can or should always be left unruled during resolution of the fair representation claim, I do believe, for reasons discussed in the text, that the facts of the present case permit such a procedure.

point to the simple fact that something other than *New York Dock* relief was negotiated, and then suggest that the union failed to consult counsel before pursuing negotiations and that the union was aware that *New York Dock* had been applied in similar situations elsewhere.

Although the Interstate Commerce Act requires the ICC to impose employee protection conditions in approved transactions, it does not specifically require the imposition of the *New York Dock* conditions. Moreover, where *New York Dock* is applied, the parties may agree to alter specific provisions so long as employee's rights are not substantially abrogated. *Norfolk & Western R.R. Co.* v. *Nemitz*, 404 U.S. 37, 44-45 (1971). The mere fact that BRAC negotiated something other than strict *New York Dock* conditions is therefore of little probative value regarding the fair representation claim.

Assuming arguendo that the union knew, or at least should have known from similar occurrences elsewhere, that *New York Dock* would likely be applicable to Terminal's closure, and that it therefore "waived" those conditions, plaintiffs have failed to demonstrate that this conduct was unreasonable, arbitrary, or perfunctory. The fact that Terminal's closure was subject to *New York Dock* would clearly not end the dispute of whether plaintiffs would have, under the circumstances, been entitled to termination benefits. Indeed, the issue of whether plaintiffs could be classified as *New York Dock* terminated employees while refusing proffered employment in Omaha remains hotly contested as a matter of law.

Plaintiffs rely on what they contend is the "plain meaning" of Article III of the *New York Dock* provisions. That article, relating to Terminal company employees, is being read by plaintiffs (arguably out of context) to state that benefits of *New York Dock* are inapplicable to terminal company employees who fail to accept comparable employment, without good cause, only where such substitute employment "does not require a change of place of residence." Article III, *New York Dock*, appendix III, 360 I.C.C. 60, 84, 89-90 (1979). A full reading of the *New York Dock* provisions

relating to Terminal company employees, shows repeated references, however, to like treatment with merged railroad employees. The identical form of words appears as an exception to the termination of dismissal allowances for such employees. 360 I.C.C. at 87 (Article I, § 6(d)). The definition of "dismissed employee" does not, however, expressly cover employees who are offered relocation rights but reject them. 360 I.C.C. at 84 (Article I, § 1(c)). As shown in the Santa Fe brief filed September 9, 1985 (Doc. 134), at pages 44-7, both the I.C.C. and arbitrators have been ruling that an employee who rejects relocation is not a dismissed employee, and does not enjoy *New York Dock* rights. *See, Burlington Northern, Inc. — Control — St. Louis S.F. Ry.*, 360 I.C.C. 946-8, 1165 (1980) (attempt to treat relocation as a dismissal rejected); *Norfolk & W. Ry. Co. — Purchase — Illinois Terminal Co.*, 363 I.C.C. 882, 889 (1981) (same; the proposal has appeal but is rejected); *CSX Corp. — Control — Chessie and Seaboard C.L.*, 363 I.C.C. 521, 589-90 (1980); *Norfolk Southern Corp. — Control — Missouri Pac.*, 366 I.C.C. 462, 620 (1982) (the transaction that initiated this litigation). A *New York Dock* arbitration board has recently stated that the benefits of that program were inapplicable to these plaintiffs, because they rejected relocation. *BRAC and Union Pac. R. Co.* (T. Page Sharp, Feb. 4, 1986) (Ex. YY, filed February 19, 1986, Doc. 157). While the current arbitration ruling is not deemed controlling, because plaintiffs seem not to have participated in the proceedings and it was handed down long after the agreement in question, it is simply the latest in a pattern of rulings that very strongly support the defendants' view of *New York Dock*.

Refusal to relocate does not seem to cut off benefits, once they start, but the general view seems to be that benefits do not begin unless employees are dismissed; and dismissal does not occur when employees are offered relocation but reject that means of saving their employment. The language relied on by plaintiffs probably means that employees who reject relocation can continue to receive *some* rights, if they were previously dismissed; it probably does not mean that Ter-

minal employees and they alone shall be treated as dismissed employees if they reject relocation. The article states that Terminal employees are simply entitled to "the same conditions as apply to other employees" and are treated "as if employees of (the merging) railroad." 360 I.C.C. at 89, 90. It seems likely the dominant purpose is equality of rights, not special favored treatment of Terminal Company employees.

In sum neither side's view of this issue appears devoid of merit. The union was therefore faced with a choice. It could push for implementation of *New York Dock* and, if successful, argue that under Article III plaintiffs were entitled to refuse to move and still collect six years' pay as termination benefits. If unsuccessful at either stage, those Terminal employees not wishing to move would be left with nothing. Alternatively, the union had the option to attempt to negotiate different conditions whereby those employees desiring to remain in St. Joseph could obtain prompt and certain benefits. It chose the latter course, and secured a severance allowance equal to one year's salary (about $35,000), payable immediately upon departure, for remaining employees. All of the plaintiffs accepted the severance pay and remained in St. Joseph. Outside the specialized area of regulated carrier law, this would seem to be a reasonably generous result, assuming a merger that is intended to save expenses.[8]

A union is to be afforded a wide range of reasonableness in the exercise of its discretion, *Huffman*, 345 U.S. at 338, and the duty of fair representation is not breached where the union's decision is based on relevant, rather than arbitrary or hostile, considerations. *Humphrey*, 375 U.S. at 350; *Hussmann*, 619 F.2d at 1237 & n.9. Plaintiffs have presented no evidence which would warrant an inference that BRAC engaged in anything other than level-headed decision-making

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[8] While the language of *New York Dock* might suggest that the union settled for a low figure, in that the odds of success might be perhaps one in three, a stronger demand by the union might well have caused the railroad to test the rights of the parties. If this occurred, "a miss is as good as a mile." The union's bargaining strength was therefore diminished.

when it chose to negotiate certain and substantial separation benefits rather than potentially gambling away any such compensation by pushing for *New York Dock* termination benefits. I therefore conclude that BRAC did not run afoul of its duty of fair representation by negotiating other than strict *New York Dock* protective conditions. This result is not altered by BRAC's alleged failure to consult counsel. In light of the absence of case law or administrative or arbitration decisions favoring the application of termination benefits to railroad employees who refuse transfers (and significant authority to the contrary), counsel would have been unable to provide any conclusively helpful guidance. The failure to consult counsel was therefore negligent at most and not a source of any harm to plaintiffs. Mere negligence will not establish a violation of the duty of fair representation. *Hellums*, 760 F.2d at 206.[9]

Plaintiffs' second allegation of union misconduct is that BRAC refused to permit members to observe negotiations. Plaintiffs' reliance on *Hussmann* for the existence of such a right is misplaced. *Hussmann* was a grievance case in which the court held that a jury could find unfair representation where the union failed to notify and invite plaintiffs to attend an arbitration regarding their grievances. 619 F.2d at 1241. It did not establish any employee right to attend contract negotiations. Moreover, Local Chairman W. D. Swift was invited and allowed to attend at least a portion of the negotiations at union expense. Allowing any requesting member to attend negotiations would obviously be a source of inconvenience and could potentially undermine the union's role of exclusive bargaining agent. While another rule may seem more "democratic," I cannot conclude that a right to attend negotiating sessions is legally mandated, or that the denial

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[9] Plaintiffs' allegation that BRAC knew they could not afford to move does not further their fair representation claim in light of the fact that BRAC negotiated substantial moving allowances. June 7, 1984, Agreement, Art. IV (providing, *inter alia*, options of $11,000 and $5,000 lump sum transfer allowances to those who did and did not own homes, respectively).

was prejudicial. I therefore conclude that the denial of such requests was reasonable and did not establish liability. *Anderson*, 557 F.2d at 169.

The third action which plaintiffs allege in support of their unfair representation claim occurred at a June 7, 1984, meeting. Present at the meeting were BRAC Local Chairman Swift, Local Secretary-Treasurer Bottorff, Vice General Chairman Quilty, and at least most of the local BRAC clerical employees. Plaintiff Morgan apparently asked a question regarding the absence of a dovetailing provision and, in Morgan's words, "I was cut off short by a very red-faced man [Quilty] that yelled at me, 'We will not have any more of that bull shit.' " Although Morgan's version of this episode leaves an impression of incompleteness, I must accept it as true for summary judgment purposes. Plaintiffs contend that Quilty's response constitutes a union failure to respond to a legitimate member inquiry, and cite *Hussmann* for the proposition that, as such, it constitutes a breach of the duty of fair representation. I do not agree.

The duty of fair representation, broad as it may be, does not impose liability on a union for every momentary and isolated flaring of tempers between union officials and members. Nothing in *Hussmann* is to the contrary. Even if Quilty's response was unreasonable, plaintiffs were not injured thereby because it came after the June 7 agreement was negotiated and executed. Quilty's remark therefore does not constitute a breach of the duty of fair representation. *See Hussmann*, 619 F.2d at 1241 n.13 (fair arbitration hearing insulates union from fair representation liability because employee would not be injured by union's conduct).

Plaintiffs' fourth allegation is that BRAC failed to investigate charges that work was being transferred away from Terminal to make it appear as though business at Terminal was declining.[10] In support of this allegation, plaintiffs con-

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[10] Although the briefing on this issue is not a model of clarity and conciseness, it appears the veracity of these charges was important in two respects. First, if work were actually being transferred, Terminal employees

tend that BRAC did not believe UP's claim that little work was being done at Terminal, that BRAC conducted no independent investigation, and that BRAC ignored evidence supplied by employees and UP. When individually scrutinized, these contentions do not state a claim of unfair representation.

Initially, there appears to be a factual basis for the contention that BRAC did not believe UP's assertion of declining business. The record does not support, however, an allegation that BRAC conducted no investigation. BRAC General Chairman for UP Lines East, D. D. Willey, testified that he repeatedly asked plaintiffs and other Terminal employees to provide him with waybills or other documents which would support their charges. Willey depo. at 25-28. Willey sought the employees' aid because he believed they would have superior knowledge of Terminal operations and much better access to relevant documentation than would he. Willey depo. at 79 and 106. Plaintiffs have made no attempt to rebut or challenge Willey's testimony, nor have they pointed to any specific allegations or evidence which would warrant a conclusion that his course of action was chosen on less than an informed and reasoned basis. *See Hussmann*, 619 F.2d at 1237 and n.9. In light of Willey's sworn deposition testimony to the contrary, plaintiffs' unsupported allegations in pleading that he ignored evidence supplied by Terminal employees does not create a sufficiently disputed fact to prevent summary judgment. Willey depo. at 27, 101, 107 and 108.

Plaintiffs' allegation that BRAC refused to look at materials submitted by UP is simply not material to the present issue. The referenced documentation consisted of UP's calculations allegedly demonstrating a sixty percent decline in UP business

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would have had union rights to follow the work. Second, there was some contention by the railroad that they could lay off seven or eight employees under the "decline in business" formula of prior agreements without paying any protective benefits. Proof that business was not actually declining would have thus greatly strengthened the union's bargaining position regarding the wholesale shutdown of Terminal.

at Terminal since 1972. Willey depo. at 83. Plaintiffs do not, however, now directly contest UP's assertion of a drastic decline in work being actually being [sic] performed at Terminal. Rather, they contend that the decreased activity was a result of work being surreptitiously transferred to other locations, and not the result of a general decline in business. UP's documentation would have therefore been of little, if any, probative value regarding plaintiffs' core complaint. Willey's decision to attempt to independently establish Terminal activity and UP's alleged transfers was therefore quite probably the most efficient and effective alternative. It was certainly not arbitrary or perfunctory.

Plaintiffs' fifth unfair representation claim involves allegations that BRAC misled Terminal employees in various ways regarding their rights under *New York Dock*. These alleged misrepresentations are that BRAC 1) originally told plaintiffs that *New York Dock* protections would apply, but later indicated that Terminal employees would not want them; 2) failed to advise plaintiffs that they could challenge a denial of *New York Dock* or that BRAC continued to believe *New York Dock* would apply; 3) agreed it would take two to three years to litigate *New York Dock* eligibility while § 4 requires arbitration in 20 days; and 4) advised plaintiffs they would be deprived of all benefits pending litigation, even though *New York Dock* prohibits changes in conditions pending a decision.

Plaintiffs implicitly argue that a submissible case of unfair representation is made by a showing that a union made specific representations and that those representations turned out to be wrong. Although it is true that falsity may be circumstantial evidence of bad faith, *cf. Harrison* v. *United Transportation Union*, 530 F.2d 558, 561 (4th Cir. 1975), *cert. denied*, 425 U.S. 958 (1976) (fact that grievance has merit is circumstantial evidence of union bad faith in failing to pursue it), I cannot agree that plaintiffs' assertion is correct as a generalized statement of the law. The standard remains whether the union's conduct was in bad faith or was otherwise unreasonable or arbitrary.

Initially, it should be noted that there has been no real

challenge to the veracity of BRAC's first indicating that *New York Dock* applied and later determining that those provisions were not desirable. BRAC apparently believed from the start, and continues to believe, that the Terminal shutdown resulted from the UP/Missouri Pacific merger, and was therefore subject to *New York Dock*. This belief is entirely consistent with a later desire to negotiate something other than *New York Dock*, in light of the previously discussed uncertainty regarding whether plaintiffs could be classified as terminated employees while refusing employment at a different location. In short, no misrepresentation has been shown.

BRAC's alleged failures to advise plaintiffs of their right to challenge a denial of *New York Dock* and of BRAC's continued belief that Terminal's closure was merger-related are omissions rather than affirmative misrepresentations. Plaintiffs have cited no authority for the proposition that, as such, they are actionable on an unfair representation theory. Even assuming they are, plaintiffs were supplied with copies of *New York Dock* itself, Newton depo. at 219, and were therefore not prejudiced by BRAC's failure to orally advise plaintiffs of the dispute resolution mechanisms. *See Anderson* v. *UPIU*, 641 F.2d 374, 579 and n.5 (8th Cir. 1981). Finally, BRAC's failure to advise plaintiffs that it continued to believe *New York Dock* applied is simply not a basis for a fair representation claim. As previously indicated, contending that Terminal's closure was merger-related is not contrary to a fear that plaintiffs would not be entitled to dismissal benefits. In the face of carrier threats that it could dismiss seven or eight employees under the decline in business formula with no protective benefits, and plaintiffs' inability to prove otherwise, BRAC's decision to negotiate other than strict *New York Dock* conditions was not arbitrary or unreasonable.

Plaintiffs next contend that BRAC indicated that a challenge to the carrier's refusal to apply *New York Dock* could take two to three years. They then argue that, since § 4 requires arbitration within 20 days, this statement was a

misrepresentation which warrants the imposition of unfair representation liability. I cannot agree because the challenged union statements were to the effect that it could take two to three years to obtain a final decision, Willey depo. at 103, not that it would take that long to submit the claim. Plaintiffs have not challenged the validity of this assertion. The more pertinent allegation is that BRAC informed plaintiffs that they would be denied all benefits pending resolution of their claim.

There are three dispute resolution provisions under *New York Dock*, two of which are relevant for present purposes.[11] Section 4 initially requires that the carrier send notice of contemplated transactions which are governed by *New York Dock* generally and which may cause dismissal or displacement of employees. 360 I.C.C. at 85, App. III § 4(a). Provision is then made for negotiation and, if necessary, arbitration, regarding "application of the terms and conditions of this appendix." *Id.* Section 4 also requires the "[n]o change in operations . . . shall occur until after an agreement is reached or the decision of a referee has been rendered." *Id.* at § 4(b). It is this last provision upon which plaintiffs rely for their present claim. The second relevant *New York Dock* dispute resolution mechanism is found in § 11, 360 I.C.C. at 87-88, App. III. This section provides for resolution of any disputes arising under other than §§ 4 or 12. *Id.* at § 11(a). It also allocates the burdens of production and persuasion in the event of a "dispute as to whether or not a particular employee was affected by a transaction." *Id.* at § 11(e). It does not provide for maintenance of the status quo pending resolution of disputes.

Although UP notified BRAC that it intended to dissolve Terminal, and of the predicted impact on Terminal employees, Willey depo. Exhibit 6, BRAC clearly contended that this was not a valid § 4 notice. Willey depo. Exhibit 7. BRAC's position appears justified in that the UP letter did not

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[11] The third applies solely to disputes over moving allowances, 360 I.C.C. at 89, App. III § 12(d), which are not at issue here.

indicate that it was a *New York Dock* transaction, and throughout negotiations and this litigation UP has affirmatively argued that the closure was not merger related or otherwise subject to *New York Dock*, Thus, there is a threshold dispute as to whether plaintiffs were affected by a transaction subject to *New York Dock*. Since § 11(e) makes explicit reference to this type of dispute, I conclude that this initial question was subject to § 11 rather than § 4 arbitration. As previously indicated, § 11 contains no status quo provision, and BRAC was therefore not acting arbitrarily or unreasonably in advising employees that UP would cease making all payments if the negotiations failed.

Plaintiffs' sixth, and final, allegedly disputed fact offered in opposition to summary judgment is that BRAC surrendered plaintiffs' rights by giving in to threats of suit by another local, in violation of its own constitution. The threat came from the Marysville, Kansas, Local after it heard rumors that all Terminal clerical employees would be transferred to the UP facility at Marysville, and would have their seniority dovetailed on the Marysville roster. The dispute centers around BRAC Resolution 91, which provides that where work is transferred from one location to another, employees have a right to move with the work and have their seniority dovetailed.

The only evidence plaintiffs offer in support of their theory that BRAC "gave in" is the inference to be drawn from the facts that a threat to file suit was made and that plaintiffs' seniority was not dovetailed. This inference alone is not sufficient to state a claim of unfair representation.[12] A contrary

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[12] I need not decide whether this inference, coupled with a supported allegation that plaintiffs in fact had a right to transfer with seniority, would state a claim, as plaintiffs have made no such showing. Willey testified that plaintiffs failed to supply him with information to refute UP's allegations that Terminal employees performed only seven to eight hours of UP work daily. He therefore decided that Resolution 91 was not applicable and that he would not be justified in further pursuing the dovetailing issue. Willey depo. at 97-98, 101. Plaintiffs have made no attempt to rebut this testimony and have not shown that Willey's decision was arbitrary or unreasonable.

ruling would mean that a group of unhappy employees could present a submissible case whenever a union made an adverse determination regarding their rights vis-a-vis another union faction.

In light of the foregoing, I conclude that BRAC is entitled to summary judgment on plaintiffs' unfair representation claim. It follows that the railroad defendants are similarly entitled to summary judgment on Count III.

B. Interstate Commerce Claims

Defendants' initial contention that this court lacks subject matter jurisdiction to hear Counts I and II of the complaint ignores clear statutory language and Eighth Circuit precedent. The parties appear to agree that Count I alleges, in essence, violation of an ICC order while Count II alleges violation of the Interstate Commerce Act. A private right of action is created for such violations in 49 U.S.C. §§ 11705(a) and 11705(b)(2),[13] respectively. Moreover, 28 U.S.C. §§ 1336(a) and 1337(a), respectively, vest district courts with jurisdiction to hear such claims.[14] The relevant inquiry is therefore not whether this court has subject matter jurisdiction, but rather whether it should invoke the doctrine of primary jurisdiction and allow the claims to first be heard by the ICC. *Augspurger*, 510 F.2d at 857 n.5 (doctrine of primary jurisdiction postpones, rather than ousts, court's jurisdiction).

The doctrine of primary jurisdiction is generally applicable to cases alleging violations of ICC orders or the Interstate Commerce Act. *Anderson*, 557 F.2d at 169.[15] Although there

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[13] Portions of Title 49 have recently been extensively recodified. All references herein are to the current section numbers. Cross references to prior codifications are readily available in the "Historical and Revision Notes" of 49 U.S.C.A. Transportation [Partial Revision] (West 1985).

[14] It should be noted that this case does not involve a direct appeal from an ICC order. Exclusive jurisdiction over those cases lies in the Courts of Appeals. 28 U.S.C. § 2342(5).

[15] In light of subsequent case law developments, I earlier noted my skep-

is a narrow exception to this general rule where employees soundly allege that the union breached its duty of fair representation, *Anderson*, 557 F.2d at 169; *Augspurger*, 510 F.2d at 858, that exception is of no help to the current plaintiffs in light of my previous holding regarding their fair representation claim. It therefore appears that Counts I and II involve matters that can be taken to the ICC for its primary consideration.

There remains, however, a dispute regarding a recently issued arbitration award. This case was filed November 19, 1984. On July 8, 1985, BRAC notified UP that it intended to arbitrate the applicability of *New York Dock* to Terminal employees under § 11. An arbitration was held on November 5, 1985, and an award was signed by the neutral [sic] on February 4, 1986. Defendants now urge, in essence, that this case be treated as an appeal from that award. I decline to do so. As plaintiffs suggest, defendants' argument appears to be in essence a collateral estoppel argument. It is therefore simply a defense to plaintiffs' Count I and II claims which may be initially addressed by the ICC under its primary jurisdiction.

I recognize that it is normal practice to stay proceedings pending resort to an agency, where primary agency jurisdiction exists. Special features of this case suggest, however, that I dismiss Counts I and II without prejudice. A stay would hold this case open indefinitely (a poor method of docket control) and would interfere with plaintiffs' appeal rights, if they wish to challenge my Count III ruling. It may also be that sober reflection, particularly in light of the arbitration ruling in this case, the cited I.C.C. actions, and this court's review of the issues would cause plaintiffs to abandon resort to the I.C.C. on Count I as being a distinctly uphill battle. Plaintiffs may also not wish to pursue Count II, as it seems to offer little chance for ultimate relief. Even if Counts I and II are pursued, moreover, the losing party may prefer to seek review

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ticism of the continued validity of the *Augspurger* and *Anderson* formulations to the extent that require [sic] a showing of hostile motive or bad faith in unfair representation claims. I am aware of no similar reason to question their discussions regarding the doctrine of primary jurisdiction.

directly in the Court of Appeals, thus bypassing further proceedings in this court.

C. State Law Claims

The sole remaining issue is the appropriate disposition of plaintiffs' state law claims. Defendants argue that they are preempted by the Railway Labor Act, the Interstate Commerce Act, and the fair representation doctrine. I agree. *E.g. Peterson* v. *Air Line Pilots Association*, 759 F.2d 1161, 1170 (4th Cir.), *cert. denied*, 106 S.Ct. 312 (1985). Moreover, in light of the above disposition of plaintiffs' federal claims, it would be imprudent to maintain the state claims under the doctrine of pendent jurisdiction. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 727 (1966).

III. CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that defendants' motion for summary judgment is GRANTED as to Count III because plaintiffs have failed to raise a material issue of fact regarding whether BRAC acted in bad faith, arbitrarily or unreasonably. It is further

ORDERED that Counts I and II be DISMISSED without prejudice. It is further

ORDERED that defendants' motion for summary judgment is GRANTED as to Counts IV through VIII because they are preempted by the Railway Labor Act. Alternatively, they are dismissed for lack of subject matter jurisdiction.

/s/ HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

DATED: June 3, 1986.